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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIE JOE BREEDLOVE,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

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Montgomery, Alabama 36104
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QUESTION PRESENTED

Whether a remark made by the prosecuting attorney stating that the case never would have gotten out of the Grand Jury denies a Petitioner due process of law.

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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OPINIONS BELOW

1. The Opinion of the Alabama Court of Criminal Appeals, published at __ So.2d __ (Ala. Cr. App. 1983), is found at page 11 of the Petitioner's brief presented to this Court as an appendix to said brief.

2. A Petition for a Writ of Certiorari from the Supreme Court of Alabama was denied, without Opinion, on November 4, 1983.

JURISDICTION

The jurisdiction of this Court is invoked by the Petitioner pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing his claim under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The Respondent adopts the Statement of the Case as set forth in the Opinion of the Alabama Court of Criminal Appeals in Breedlove v. State, 7 Div 72, Ms. Opinion May 31, 1983 (Ala. Cr. App.), which is included as an appendix to the brief of the Petitioner filed with this Court. That part of the Opinion found on pages 1-2 is quoted:

> "The defendant was indicted and convicted for murder. Sentence was twenty year's imprisonment. One issue is presented on appeal.
>
> The record reflects the following occurred during the prosecutor's closing argument to the jury:
>
> MR. IGOU (District Attorney): '. . . It never would have gotten out of the grand jury. If somebody points a gun at you - -.'
>
> MR. WILKINSON (Defense Counsel): 'Exucse me. We object to that statement, please the Court.'
>
> THE COURT: 'Overruled.'"

The Alabama Court of Criminal Appeals affirmed the conviction of the Petitioner on

May 31, 1983, holding that the above-quoted statement by the prosecutor did not substantially injure the rights of the accused and that said remarks did not constitute reversible error. An application for rehearing was filed by the Petitioner and overruled on July 5, 1983.

A petition for a writ of certiorari was denied by the Supreme Court of Alabama on November 4, 1983, without Opinion. Petitioner then filed the instant petition with this Honorable Court.

REASONS FOR DENIAL OF THE WRIT

A REMARK MADE BY THE PROSECUTING ATTORNEY STATING THAT THE CASE NEVER WOULD HAVE GOTTEN OUT OF THE GRAND JURY DOES NOT DENY A PETITIONER DUE PROCESS OF LAW.

The Petitioner contends in his petition to this Honorable Court that a statement made by the prosecuting attorney during the Petitioner's trial was so unduly prejudicial as to deny the Petitioner due

process of law. The particular statement which Petitioner alleges as a basis for relief to this Court is set out in the appendix to the Petitioner's brief, the Opinion of the Alabama Court of Criminal Appeals. For purposes of this argument, that particular statement is quoted as follows:

> "MR. IGOU (District Attorney): '. . .It never would have gotten out of the grand jury. If somebody points a gun at you - -.'"

Petitioner argues that this statement conveyed to the jury the impression that the Grand Jury would not have indicted the Petitioner if he had not been guilty. The Alabama Court of Criminal Appeals rejected this argument of the Petitioner and in addition thereto held that the particular error urged by the Petitioner as a basis for reversal of his conviction was not properly preserved in the trial court below.

Respondent would submit the following

several grounds as reasons for denying the writ in the present case.

I. FAILURE TO PROPERLY PRESERVE THE THE ISSUE FOR REVIEW AT THE TRIAL COURT LEVEL.

Defense counsel for the Petitioner, at the trial court below, interposed a general objection to the statement of the prosecuting attorney which statement is now urged by the Petitioner as a ground for granting of this writ and reversal of his conviction. A review of the portion of the record as set forth in the Opinion of the Alabama Court of Criminal Appeals reveals that the objection was phrased by defense counsel to two separate sentences made by the prosecuting attorney in his argument to the jury. The Respondent would submit that a review of Alabama state procedural law on this point leads to the conclusion that the alleged error was not properly preserved for review by the objection of defense counsel. In order to properly preserve such an issue for review by Appellate

Courts, a specific objection to the specific part of the closing statement of the prosecuting attorney must be made by defense counsel in order to bring the alleged error to the attention of the trial court for remedial action. Williford v. State, 365 So.2d 1257 (Ala. Cr. App. 1978), cert. denied, 365 So.2d 1258 (Ala. 1979). Further, an objection not separating a permissible statement from an allegedly impermissible statement is properly overruled. Emerson v. State, 281 Ala. 29, 198 So.2d 613 (1967).

Therefore, in compliance with procedural law of the Alabama Courts, defense counsel should have made a specific objection to that specific statement of the prosecuting attorney to which the objection was voiced. The failure of defense counsel to properly preserve this issue for review by the Alabama Appeals Courts pretermits its consideration beyond the trial court level.

II. THE STATEMENT OF THE PROSECUTING ATTORNEY AMOUNTED ONLY TO AN EXPLANATION OF PROCEDURE AND PROCESSES PRELIMINARY TO THE TRIAL OF A CRIMINAL FELON AND AS SUCH DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS.

The cases relied upon by Petitioner in his brief to this Court deal with situations wherein the prosecuting attorney's closing argument was closely scrutinized by this Court and either approved or disapproved, based on the content of the statement and its application to the particular facts of cases involved. In its opinion, the Alabama Court of Criminal Appeals referred to prior cases decided by the Courts of Alabama which dealt with alleged prosecutorial misconduct in argument to the jury. In the case of Sisk v. State, 22 Ala. App. 368, 115 So. 766 (1928), the prosecutor's statement referred to the doubt owed a criminal defendant in having already been given to him by the Grand Jury's

indicting of the defendant for murder in the second degree instead of murder in the first degree. The Alabama Court of Criminal Appeals in that case held that such comment was not so unduly prejudicial as to deny the defendant due process of law. In the case of Common v. State, 36 Ala. App. 86, 52 So.2d 415 (1951), the prosecuting attorney stated to the jury in his closing argument that before a defendant can be tried on a criminal charge witnesses had to go before a Grand Jury and testify and an indictment returned against the defendant before he could be tried. In that case the Court held that this statement amounted only to an explanation of the procedure and processes preliminary to the trial of a criminal felony. As such, the comment was not improper.

Respondent would submit that these prior cases of the Alabama Courts reflect, that for substantative purposes, the statement in the instant case did not constitute such improper

conduct by the prosecutor as to necessitate a retrial of the Petitioner. The alleged misconduct of the prosecutor in his closing argument to the jury in the instant case fails to rise to the magnitude of those cases relied upon by the Petitioner as grounds for reversal of his conviction.

Respondent would also submit that the Petitioner has failed to show unto this Court any cases decided by this Honorable Court wherein a statement such as that in the case at bar has been held to be of such a prejudicial error as to require a reversal of a criminal defendant's conviction.

III. THE ALLEGED MISCONDUCT OF THE PROSECUTOR IS INSUFFICIENT IN AND OF ITSELF TO REQUIRE A NEW TRIAL OF THE PETITIONER.

The Petitioner argues to this Court that the conduct of the prosecutor at the trial of the Petitioner was so improper so as to deny the Petitioner of due process of law.

However, it appears that the only alleged prosecutorial misconduct centers on the closing argument of the prosecutor to the jury at the trial of the Petitioner. In the case of Donnelly v. DeChristoforo, 416 U.S. 637 (1974), this Court stated as follows:

> ". . .a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretation." At page 647.

The reasoning in that opinion was that the statement of the prosecuting attorney must be taken in view of the total trial rather than to isolate that statement and take it out of context. The Court in that case further went on to find that there was no denial of constitutional due process in the statement by the prosecuting attorney as such had been eradicated by the trial court judge.

Petitioner's main reliance is based on the case of Berger v. United States, 295 U.S. 78 (1935). However, Respondent would refer this Court also to that part of the Berger case wherein the Court stated that if the evidence against the petitioner at his trial had not been so weak then the Supreme Court probably would have reached a different result as to the impropriety of the statement of the prosecutor during his closing argument to the jury. Respondent would submit that the facts in the instant case are not weak against the Petitioner in proving the offense with which he was charged. Rather, the facts are "overwhelming" in implicating the Petitioner for the crime for which he now stands convicted. Respondent would also submit that the comment of the prosecuting attorney in the Berger case, that being an assertion of personal knowledge of the prosecutor concerning evidence and a particular witness, is so different substantively from the statement in

the particular case before this Court now that it renders the Berger rationale inapplicable to the instant petition.

Finally, Respondent would submit that the standard of review applied by this Court leads to the conclusion that the alleged prosecutorial misconduct is an insufficient basis for granting of the writ in the instant case. As set forth in the case of Smith v. Phillips, 102 S.Ct. 940 (1982):

> :. . .touchstone on due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." At page 947.

The Court further held that the lower court's finding that prosecutorial misconduct alone required a new trial was erroneous. Respondent would submit that an applicaiton of this same legal logic results in a finding that the alleged prosecutorial misconduct in the instant case fails to rise to such a level that the Petitioner was thereby denied due process of law.

CONCLUSION

Based on the foregoing argument the Respondent would submit that the writ of certiorari requested by the Petitioner in this case is due to be denied.

Respectfully submitted,

/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA

/s/J. Anthony McLain
J. ANTHONY McLAIN
SPECIAL ASSISTANT
ATTORNEY GENERAL OF
ALABAMA

CERTIFICATE OF SERVICE

I, J. Anthony McLain, a Special Assistant Attorney General for the State of Alabama, a member of the Bar of the Supreme Court of the United States and one of the attorneys for the State of Alabama, Respondent, do hereby certify that on this the _____ day of March, 1984, I served three copies of the foregoing Brief and Argument in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Alabama on the attorney for Petitioner by placing same in the United States Mail, postage prepaid and properly addressed as follows:

Honorable Charles A. McGee
301 Grand Avenue South
P.O. Box 1085
Fort Payne, Alabama 35967

/s/ J. Anthony McLain
J. ANTHONY McLAIN
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